

Hon. David L. Mackey
Superior Court in Yavapai County
120 S. Cortez, #300
Prescott, AZ 86303
Telephone: (928) 771-3580
Chair, Committee on Superior Court

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	Supreme Court No. R-15-0018
)	
Petition to Amend Rule 31,)	Comment to Petition to Amend Rule 31,
Rules of the Supreme Court)	Supreme Court of Arizona
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Members of the Committee on Superior Court (COSC) have authorized the committee chair, the Honorable David L. Mackey, to file this comment on their behalf.

The committee opposes the proposed change to Rule 31(d)(25)(A), Rules of the Supreme Court, and respectfully asks the Court to retain the current exemption for mediators who are employed, appointed, or referred by a court or government entity and are serving as mediators at the direction of the court or government entity. A similar proposal was put forward and adopted in 2003 but was reversed after a motion for reconsideration filed by the then-existing Alternative Dispute Resolution Advisory Committee.

Petition R-15-0018 offers no reason for the elimination of the exemption for mediators who are employed, appointed, or referred by the courts. COSC members, the majority of whom are superior court judges, are unaware of complaints regarding the ability of court-appointed mediators to prepare mediation agreements. But if this rule change is implemented, it will have a number of significant negative impacts on the superior courts.

Caseflow. For the superior courts, the impact would affect multiple case types in the court—from juvenile and dependency cases to the family courts. The family courts would be hit

particularly hard, resulting in longer wait times for many parties in family court to be heard. Family court dockets are already crowded, and requiring court-appointed mediators to be either attorneys or legal document preparers would create additional barriers to efficient case resolution and access to justice.

For example, the Superior Court in Maricopa County reports that in fiscal year 2014, the court-appointed professionals in the Family Court Department conducted 2,232 mediation conferences, 3,825 early resolution conferences, and 2,330 enforcement conferences. Many of these conferences yielded partial or full agreements.

In Pima County, parents in all family law cases in which decision-making or parenting time is at issue must attend mediation conducted in the superior court's Family Center for Conciliation Court (FCCC). In fiscal year 2013, the FCCC received 1,909 referrals for mediation and completed 1,567 referrals by the end of the fiscal year. Of the completed cases, 64 percent resulted in full or partial agreements, with only 53 objections filed. According to FCCC Director Grace Hawkins, most objections were not related to an inaccurate recitation of the agreement.

Caseflow impact would be felt in rural counties, too. In fiscal year 2014, Mohave County court-appointed mediators completed 458 domestic relations mediations. Of those, 239 reached either a full or partial agreement, 114 were completed but not signed by the parties, and 105 were unresolved. During that same time, the court also conducted 223 dependency mediations. The successful agreements were mediated by court-employed mediators who also prepared the written agreements for the parties' signature.

In 2014, approximately 450 mediations were directed to Yuma County's Superior Court Conciliation Court Services. There, court-appointed mediators assist parties in reaching agreement in 75 to 90 percent of the cases.

The proposed rule change would shut down the mediation program in the Superior Court in Yavapai County. This program resolves between 75-90 percent of the cases that are assigned to mediation. But court rule requires every settlement agreement to be either reduced to writing and signed by the parties or stated on the record in open court. The superior court has neither enough judicial officers to hear the recitation of every agreement reached through mediation nor enough judicial officers to handle contested hearings on the many cases that might otherwise be resolved through mediation.

Qualifications. A legal document preparer, at minimum, must have a high school diploma or a GED, two years of law-related experience, and successful completion of the LDP exam. No mediation training is required for LDPs.

In contrast, court-appointed mediators have qualifications that substantially exceed the LDP minimum. Arizona's judicial officers and court administrators are confident in the ability of court-appointed mediators not only to negotiate agreements effectively and professionally but also to draft written agreements resulting from those mediation sessions.

Court-appointed mediators are well qualified, with impressive educational and professional backgrounds. Some mediators are licensed attorneys; others have earned bachelor's and master's degrees in social work, counseling, psychology, and business. Some have worked in the legal community as paralegals or as judicial officers.

Maricopa County's Family Court Department has six family law case managers (licensed attorneys), ten conference officers (bachelor's level), and eight conciliators (master's level). Pima County's Family Center for Conciliation Court currently has budgeted for twelve full-time counselor/mediator positions. Pinal County employs eight mediators, two of whom are licensed attorneys. Other court-employed mediators around the state are equally well qualified.

Court-appointed mediators are also highly trained in mediation techniques, domestic violence, and issues affecting children. They are careful to screen for domestic violence issues between the parties and are knowledgeable about procedures for conducting mediation safely between parties when domestic violence is a factor.

Agreements drafted by court-appointed mediators are subject to judicial review before the agreement is accepted as a court order. In Pima County, FCCC mediators are trained in the craft of reducing agreements to writing. Veteran mediators mentor less experienced mediators, reviewing agreements they have drafted. The FCCC maintains an internal monitoring process to review agreements, until management believes the mediator is proficient.

The Superior Court in Yavapai County has court-employed mediators who facilitate resolution of domestic relations disputes regarding legal decision making, and they assist parents in completing standard parenting plan forms. They also work with litigants to resolve disputes regarding money and property in family law, probate, and civil cases. They prepare a mediation agreement in a format provided to them by the court and submit them to a judge for review.

Mediators who are employed by the Yuma County Superior Court Conciliation Court Services must have a minimum of a bachelor's degree. Prior to being able to conduct mediations without supervision, they must attend a 40-hour mediation course and participate in a mentorship program with an experienced mediator in the department. The mentorship consists of observing mediations, co-mediating, and finally being observed by an experienced mediator. This usually consists of a minimum of 30-40 mediations.

Cost. Arizona's courts would find themselves in a difficult financial position if all of their non-attorney and non-LDP mediators are required to obtain either law degrees or LDP certification. Even the less expensive option—the certified LDP—has initial and recurring

certification fees that Arizona's courts are not in a position to absorb. Counties struggle every day to contain costs, and this change would impose an unanticipated financial burden on either the courts, if they subsidize the certification fees, or the court-appointed mediators, if they are expected to cover this cost out of pocket.

Funds expended on acquiring the LDP certification would bring little added value to court-operated mediation programs that employ mediators who have qualifications superior to those required of LDPs.

CONCLUSION

Court-appointed mediators possess qualifications that exceed those required of LDPs. Court-employed mediators are subject to annual continuing education requirements, and they are bound by the Code of Conduct for Judicial Employees. The mediated agreements they prepare are subject to the court's oversight. Safeguards to protect the public are already in place in Arizona's courts.

For these reasons and those stated above, COSC respectfully asks the Court to retain the exemption for court-appointed mediators in Rule 31(d)(25)(A), Rules of the Supreme Court.

Respectfully submitted this 1st day of May, 2015.

/s/
Hon. David L. Mackey
Judge of the Superior Court
Superior Court in Yavapai County

Cc: Hon. Ann A. Scott Timmer
Chair, Committee on the Review
of Supreme Court Rules Governing
Professional Conduct and the Practice of Law